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In The Supreme Court of the United States

PAUL T. PALMER, by and through his parents and legal guardians, PAUL D. PALMER and DR. SUSAN GONZALEZ BAKER,

Petitioner,

v.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969), this Court held that the First Amendment only permits regulation of student speech upon a showing of "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." This Court has since recognized other narrow categories of student speech that may be limited without a showing of substantial disruption: speech that is sexually explicit, indecent, or lewd (*Fraser*); is school-sponsored (*Hazelwood*); or advocates illegal drug use (*Morse*). In conflict with the Second and Third Circuits, the Fifth, Sixth, and Ninth Circuits have held that content-neutral regulations of student speech are not subject to the general rule of *Tinker*. The questions presented are:

1. Whether, notwithstanding *Tinker*, public schools may, consistent with the First Amendment, broadly impose content-neutral and viewpoint-neutral restrictions on student speech as long as the restrictions satisfy the lower standard of intermediate scrutiny normally applied to expressive conduct, and not to pure speech.

2. Whether the intermediate standard enunciated by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968), is satisfied when, contrary to *O'Brien*, the court does not require the government to demonstrate that the regulation at issue actually furthers an important government interest or that it is no greater than necessary to serve such an interest.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Paul T. Palmer, by and through his parents and legal guardians, Paul D. Palmer and Dr. Susan Gonzalez Baker. Respondent is the Waxahachie Independent School District.

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STATEMENT

This case is an optimal vehicle for resolving an exceptionally important question that has divided the lower courts: whether the framework for student-speech claims established by this Court over 40 years ago in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), may be set aside, and a different standard of constitutional scrutiny applied, to regulations of student speech deemed content and viewpoint neutral. This Court's review is necessary to resolve the conflict and clear up the pervasive confusion among the lower courts (not to mention among school officials, students, and parents) regarding the scope of student-speech rights under *Tinker*. No set of facts—undisputed in the courts below—could more squarely frame the issue than those presented in this case.

If left undisturbed, the Fifth Circuit's decision not only threatens to vest government-run schools with virtually unfettered authority to censor student speech. It also threatens to extend the reach of government's ability to restrict protected speech into other contexts beyond schools. This Court's review is necessary to resolve the conflict, restore the sensible balance the Court has struck between the rights of students and the responsibilities of educators, and prevent the systematic application of a defective analytical framework for determining when restrictions on student speech violate the First Amendment.

1. During the 2008 presidential campaign, Waxahachie Independent School District ("WISD") officials informed Paul T. "Pete" Palmer—then a sophomore at Waxahachie High School—that he would be punished if he expressed his political support for then-presidential candidate and former U.S. Senator John Edwards by wearing a t-shirt emblazoned with the words "John Edwards 08" and "www.johnedwards.com" to class. App. 42; R.431-32 at ¶¶ 7-9. School officials explained to Pete's parents that the political message on Pete's shirt was not prohibited because it was offensive, but because it contained "unapproved words" under the school district's policy. R.432-33 at ¶ 10. At that time, the policy allowed "WISD clubs, organizations, sports, or spirit t-shirts, college or university t-shirts, or solid-colored t-shirts." App. 37.

For several months, Pete and his parents unsuccessfully sought redress through WISD's grievance process. App. 42-47. Ultimately, the superintendent rejected their appeal, acknowledging that "Pete was disciplined for wearing a t-shirt with the logo 'John Edwards 08' emblazoned on the front," but reiterating that WISD's policy allowed students to express messages on their t-shirts concerning "WISD clubs, organizations, sports, or spirit * * * [or] college[s] or universit[ies]" but no others, including political messages. *Id.* at 42-43.

2. After deciding that further appeals within WISD would be futile, Pete filed this action by and through his parents in the Northern District of Texas.

App. 2; R.434-35. The original complaint alleged a claim under 28 U.S.C. § 1983 that the school district's censorship of Pete's political speech violated the First Amendment, and sought declaratory relief, preliminary and permanent injunctive relief, and nominal damages. App. 2.

In its answer, WISD admitted that Pete's "political message" presented "no concrete threat of 'substantial disruption or material disturbances to school activities.'" App. 2-3; R.298. WISD also admitted that Pete's political message was not "sexually explicit, indecent or lewd," "was not communicated as part of a school-sponsored activity," and "does not promote the use of illegal drugs." *Id.* at 3. In its response to Pete's preliminary injunction motion, WISD conceded that Pete's speech "is indisputably political in nature." R.218. And in its motion to consolidate the hearing on the preliminary injunction motion with "the final hearing on the merits," WISD stated that "[t]he facts are essentially uncontested, and the legal positions of the parties on the merits need no further development by way of discovery* * * *" R.245.

3. At the preliminary injunction hearing, WISD's assistant superintendent, Mr. Truitt, testified in response to questions by the district court that, on its face, the school district's policy of prohibiting students from expressing political messages on t-shirts did not apply to prohibit political messages on polo shirts. Tr.75:16-20 (R.83). Prompted by the district court, WISD represented it would not enforce its existing policy to prohibit Pete from wearing a

polo shirt emblazoned with "John Edwards" or any other political message for the remainder of the school year. Tr.83:1-7 (R.91). The district court denied Pete's preliminary injunction motion without prejudice. App. 3; Tr.84:25-85:9 (R.92-93).

The district court ordered WISD to finalize and submit its new policy for the 2008-2009 school year by June 1, 2008, instructed Pete "to make a request to wear specific attire" under the new policy within seven days after that, and ordered WISD to "respond to that request." Tr.85:8-9 (R.93).

4. In May 2008, the school board approved its new policy. App. 3, 30-36. That policy, which is still in effect, purports to ban all "slogans, words, [and] symbols" on clothing, but makes exceptions for messages that "promote the school district and its instructional programs." *Id.* at 30-31. Although WISD's policy no longer allows "college or university t-shirts," it continues to make exceptions for "campus principal-approved WISD sponsored curricular clubs and organizations, athletic team, or school 'spirit' collared shirts or t-shirts." *Id.* at 31.

As directed by the district court, Pete submitted a written request to WISD that he be allowed to wear three different shirts to class. App. 4. Pete enclosed three shirts with that request: (1) a polo shirt displaying the words "Freedom of Speech" on the front and the text of the First Amendment—"Congress shall make No Law * * * abridging Freedom of Speech"—and "First Amendment" on the back; (2) another polo shirt

displaying the words "John Edwards 08" on the back; and (3) the original "John Edwards 08" t-shirt. *Ibid.* WISD denied Pete's request as to all three shirts. *Ibid.* WISD stated that even if Pete were to seek an exemption "based upon Pete's desire to express his personal political preferences, such a request would be denied." R.525 at ¶ 8; R.548.

5. In light of those representations, Pete filed an amended complaint and a second motion for a preliminary injunction. App. 4. Pete's amended complaint seeks relief identical to that sought in his original complaint. In its answer to the amended complaint, WISD once again admitted that Pete's political "messages" are "not disruptive." R.519 at ¶ 44.

6. At the hearing on Pete's second motion for a preliminary injunction, WISD's witness, deputy superintendent Mr. Truitt, confirmed that Pete would not be granted an exemption from the policy to express political messages on his shirts. Tr.32:21-33:15 (R.127-28). Mr. Truitt further testified that the policy did not prohibit students from affixing to their clothing "campaign buttons" or even "bumper stickers" that express political views. App. 4. Counsel for WISD represented that even "pie" sized buttons would be permissible under WISD's interpretation of its policy. Tr.35:23-37:6 (R.130-32); Tr.42:20-22 (R.137).

Counsel for WISD elaborated that the permissibility of buttons and bumper stickers affixed to

clothing would be governed under a provision of the policy providing that "[a]ny aspect of a student's appearance or attire that is likely to distract or disrupt the learning environment, including images or messages that are lewd, vulgar, sexually suggestive, containing profanity, or promoting violation of school rules (such as promoting drug or alcohol use) are prohibited." R.306; Tr.46:10-20 (R.141).

7. The district court denied Pete's motion for a preliminary injunction on the ground that Pete had "not satisfied [his] burden of proving irreparable injury in light of the court's determination that the school district will not prevent Mr. Palmer or other students from conveying political messages via bumper stickers affixed to their clothing, or buttons that do the same." App. 5.

The district court expressed the view that although the merits present "a close question," the school district's prohibition on political speech is "permissible under the cases as I have read them." App. 26-27. Even so, the district court emphasized that "this is an important question that ought to be adjudicated at least by the Circuit" and "[i]f not by the Circuit, then by the Supreme Court." *Id.* at 27.

8. On appeal, the Fifth Circuit affirmed. App. 21. The court of appeals first held that the district court abused its discretion by departing from the well-established rule that where, as here, a plaintiff alleges injury from a regulation that directly limits

speech, the irreparable nature of the harm may be presumed. App. at 5.

Proceeding to the merits, the court of appeals acknowledged that under the general rule established by *Tinker*—i.e., that a school may regulate student speech if "necessary to avoid material and substantial interference with schoolwork or discipline" (*Tinker*, 393 U.S. at 511)—Pete "would prevail" on his free-speech claim given the school district's stipulations that Pete's speech "is not disruptive, lewd, school-sponsored, or drug-related." App. 7-8. But the panel nonetheless ruled for the school district, holding that it was bound by Fifth Circuit precedent permitting the restriction of student speech where school officials have put in place regulations deemed viewpoint and content neutral, see *Canady* v. *Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001). App. 16-21.

Under that circuit precedent, the panel explained, content-neutral restrictions on student speech are not subject to constitutional review under the *Tinker* framework. App. 12. Rather, they are subject only to the intermediate scrutiny accorded expressive conduct, such as draft-card burning and nude dancing, enunciated by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968). App. at 8-12. The court of appeals acknowledged that "'although it would be fair * * * to debate whether' intermediate scrutiny should ever apply to student speech, 'that debate already took place' in *Canady*." *Id.* at 9.

The court of appeals next determined that the school district's policy was "content neutral." App. 12-14. The court acknowledged Pete's position that the policy is content-based because, on its face, it allows some categories of speech while prohibiting others—and noted that Pete's position "has some judicial support."[1] *Id.* at 12-13. Nonetheless, the court of appeals held that the policy was content neutral because, in the court of appeals' view, the school district "was in no way attempting to suppress any student's expression* * * *" App. 13-14.

Having thus deemed the policy content neutral, the court of appeals purported to analyze the constitutionality of the "dress code" as a whole under intermediate scrutiny—ignoring that Pete's narrow as-applied constitutional challenge puts at issue only WISD's decision to make exceptions to its prohibition

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[1] The court of appeals deemed the restriction on Pete's political speech content neutral under *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."). App. 13. But the Court has also held that "[a]s a general rule, laws that *by their terms* distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 643 (1994) (emphasis added). Thus, "a regulation" like this one "that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends * * * to prohibition of public discussion of an entire topic." *Boos* v. *Barry*, 485 U.S. 312, 319 (1988) (quoting *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980)).

on "slogans, words, and symbols" on student clothing for speech that "promotes the school district and its instruction programs," but not for Pete's political speech. App. 14-21; see *Harper* v. *Poway Unified Sch. Dist.*, 445 F.3d 1166, 1175 n.11 (9th Cir. 2006) ("We need not rule upon the validity of the School's dress code or other * * * policies" where, as here, the student "did not seek to enjoin the enforcement of the School's dress code or any other school policies against any and all students, but sought only to stop the violation of [the student's] purported constitutional right").

The court of appeals concluded its analysis by noting that so long as students in public schools retain some means of expression—such as "outside of school" and "orally at school or through their written work"—intermediate scrutiny's requirement that a government regulation be "no more strict than is essential to achieve its goals" is satisfied. App. 20-21. Under the Fifth Circuit's approach, the prohibition on armbands struck down by the Court in *Tinker* would have survived scrutiny because the students could have worn their armbands after school and at home, and could have expressed their views to the small number of students with whom they conversed during the school day.

REASONS FOR GRANTING THE PETITION

The "vigilant protection of constitutional freedoms is nowhere more vital than in the community of [our] schools." *Healy* v. *James*, 408 U.S. 169, 180 (1972). Among those constitutional freedoms is the right to engage in political speech, which lies "at the core of what the First Amendment is designed to protect." *Morse* v. *Frederick*, 127 S. Ct. 2618, 2626 (2007) (quoting *Virginia* v. *Black*, 538 U.S. 343, 365 (2003)). Because students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, this Court has held that absent evidence of school disruption, the First Amendment requires that students be permitted to express their political views. *Morse*, 127 S. Ct. at 2636-37 (Alito, J., concurring).

In violation of these fundamental constitutional principles, the school district here adopted a policy prohibiting the very speech that the "First Amendment [was] designed to protect" (see *Morse*, 127 S. Ct. at 2626), while allowing speech that "promotes" the school district and its "instructional" mission. The Fifth Circuit furthered an entrenched circuit split by upholding this censorship, consistent with the decisions of the Ninth and Sixth Circuits but in conflict with the Second and Third Circuits. It reached this conclusion notwithstanding the school district's admissions that Pete's silent, passive expression of support for a presidential candidate did not fall into any of the categories of student speech

that this Court has recognized as subject to regulation. Specifically, Pete's attempted communication was "indisputably political in nature," posed "no concrete threat" of "substantial disruption" or "material disturbances" to school activities, "was not communicated as part of a school sponsored activity," was not "offensive" or "sexually explicit, indecent, or lewd," and did "not promote the use of illegal drugs" or any other activity harmful to young people.

The Fifth Circuit's decision not only conflicts with the decisions of other Circuits, but also departs from the traditional principles that have long guided this Court's student-speech jurisprudence. Rather than a problem to be contained or a dangerous activity to be minimized, this Court has held up nondisruptive political speech by students as a transcendent value, one that lies "at the core of what the First Amendment is designed to protect"—even in schools. *Morse*, 127 S. Ct. at 2626 (quoting *Virginia* v. *Black*, 538 U.S. 343, 365 (2003)); *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986) (noting the "marked distinction between the political 'message' of the armbands in *Tinker*," which upheld "students' right to engage in a nondisruptive, passive expression of a political viewpoint," and "the sexual content" of the speech in *Fraser*).

Our public schools have a responsibility to teach students about constitutional principles not only as part of the curriculum, but also by faithfully applying them. In the context of a presidential election, that

responsibility would seem, if anything, to lead our schools to encourage non-disruptive means of expressing political views—not to stifle them.

To be sure, public school officials have a responsibility to maintain order and discipline so that students can learn. The Court has struck a sensible balance by permitting school officials to curtail the exercise of political speech, but only when it poses a concrete threat to school discipline. Any other rule would foster cynicism and disrespect in our youth, who would perceive on the part of those in authority a hypocritical failure to respect and defend the values upon which our Nation was founded. This case is an ideal vehicle for re-affirming those principles, resolving the conflict among the Circuits about the proper application of *Tinker*, and bringing badly needed clarity to an important area of the law—one that daily impacts millions of students, their teachers, and school administrators.

The petition should be granted because the Fifth Circuit has decided an important, recurring issue of constitutional law in a manner contrary to that of other Circuits. It should be granted because the Fifth Circuit's decision is in conflict with the decisions of this Court. And it should be granted because the Fifth Circuit's lenient review of government censorship sets an exceptionally dangerous precedent that, if permitted to stand, cannot be limited in any principled fashion to expressive conduct or even to schools—thereby enlarging government's ability to censor the

exercise of core First Amendment freedoms in a wide variety of contexts.

I. THE CIRCUITS ARE DEEPLY DIVIDED ON WHETHER *TINKER* APPLIES TO CONTENT-NEUTRAL REGULATIONS OF STUDENT SPEECH

This Court set out the framework for student free-speech claims in *Tinker* v. *Des Moines Independent Community School District*, *supra*. In *Tinker*, students decided to wear black armbands to school to express their opposition to the Vietnam War. In response to the planned protest, school officials prohibited the wearing of all armbands and provided that any students wearing armbands would be suspended from school until they returned without them. The Court held that the students could not be disciplined under the school policy, explaining that the wearing of armbands was "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 505-06. The Court explained that a student "may express his opinions * * * if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 513.

The Court took care to acknowledge "the special characteristics of the school environment," *id.* at 506,

by making clear that school officials could prohibit student speech if that speech "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 509. Recognizing that school officials have comprehensive authority, consistent with constitutional safeguards, to prescribe and control conduct in the schools, the Court held that absent a showing by the school "that engaging in the forbidden conduct would materially and substantially interfere" with school discipline, school policies that place restrictions on a student's freedom of speech cannot be sustained. *Ibid.* (internal quotations and citations omitted). The Court explained that "in our system" students "may not be confined to the expression of those sentiments that are officially approved." *Id.* at 511. Thus, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Ibid.*

The Court re-affirmed *Tinker* and further delineated the scope of *Tinker*'s general rule in *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986). In *Fraser*, the Court upheld disciplinary action against a student who gave a speech at a high school assembly that was laced with "pervasive sexual innuendo." *Id.* at 677-79. The Court held the school's actions permissible because "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" among students. *Id.* at 683. School policies thus can

prohibit student speech if it is "vulgar," "lewd," "indecent," or "plainly offensive." *Id.* at 683-85.

The Court next affirmed *Tinker* as the general standard and addressed student-speech rights in *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), permitting a high school principal to censor articles in a school-sponsored newspaper. While the Court upheld the principal's deletion of the articles from the student newspaper, it limited the reach of its holding to school-sponsored speech. As the Court put it, "whether the First Amendment requires a school to *tolerate* particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to *promote* particular student speech." *Id.* at 270-71 (emphasis added). Under *Hazelwood*, school officials may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

In its most recent student-speech case, the Court held that school officials may permissibly restrict student speech that could be "reasonably viewed as promoting illegal drug use." *Morse* v. *Frederick*, *supra*, at 2625. The speech at issue in *Morse* was a large banner reading "Bong Hits 4 Jesus" unfurled by students at a school-supervised event. *Id.* at 2622. Noting that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest,"

the majority concluded that the "First Amendment does not require schools to tolerate at school events student expression that contributes to" the dangers posed by illegal drugs. *Id.* at 2628-29. In reaching its holding, the Court expressly declined to prohibit student speech promoting illegal drug use on grounds that such speech was "offensive," noting that "much political and religious speech might be perceived as offensive to some." *Id.* at 2629.

In *Morse*, the Court re-affirmed *Tinker* and described it as holding—without limitation or qualification—that "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Id.* at 2626. The Court focused on the "essential facts" that the students in *Tinker* "sought to engage in political speech, using the armbands to express their 'disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them.'" *Id.* at 2626 (quoting *Tinker*, 393 U.S. at 514).

In a concurring opinion, Justice Alito, joined by Justice Kennedy, agreed that "public schools may ban speech advocating illegal drug use." *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring). But Justice Alito "join[ed] the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction

of speech that can plausibly be interpreted as commenting on any political or social issue * * * * *" *Id.* at 2636.

The majority opinion, Justice Alito stressed, "correctly reaffirms the recognition in [*Tinker*] of the fundamental principle that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* at 2636-37 (Alito, J., concurring). Justice Alito acknowledged that "*Tinker*, which permits the regulation of student speech that threatens a concrete and 'substantial disruption,' [*Tinker*, 393 U.S.] at 514, does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings." *Id.* at 2637. "But," Justice Alito emphasized, "I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court." *Ibid.* Justice Alito thus joined the majority opinion "on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions." *Ibid.*

Over the last 40 years, then, the Court has carved out a few narrow categories of speech that a school may restrict even without the threat of substantial disruption, while at the same time reaffirming the general rule set forth in *Tinker* that "[i]n the absence of a specific showing of *constitutionally valid reasons* to regulate their speech, students are entitled to freedom of expression of their

views." *Tinker*, 393 U.S. at 511 (emphasis added). But, as numerous courts have noted, there is conflict and confusion in the lower courts about what counts as a "constitutionally valid reason" for regulating student speech. See, e.g., *Guiles* v. *Marineau*, 461 F.3d 320, 326 (2d Cir. 2006) (Cardamone, Sotomayor, Pooler, JJ.), *cert. denied sub nom. Marineau* v. *Guiles*, 127 S. Ct. 3054 (2007) ("It is not entirely clear whether *Tinker*'s rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser*, or whether it applies only to political speech or to political viewpoint-based discrimination."); *Bar-Navon* v. *Sch. Bd. of Brevard County, Fla.*, No. 6:06-cv-1434-Orl-19KRS, 2007 WL 3284322, at *5 (M.D. Fla. Nov. 5, 2007) ("Courts at all levels have demonstrated confusion as to the scope of *Tinker*'s holding * * * * Courts disagree * * * as to the broader question of whether the legal standard in *Tinker* is applicable more generally to all regulation of student speech and not simply speech that expresses a particularized view.").

Specifically, courts are split on whether the *Tinker* framework extends to content-neutral and viewpoint-neutral regulations. The Ninth Circuit has taken the position that "*Tinker* says nothing about how viewpoint- and content-neutral restrictions on student speech should be analyzed, thereby leaving room for a different level of scrutiny." *Jacobs* v. *Clark County Sch. Dist.*, 526 F.3d 419, 431-32 (9th Cir. 2008). Similarly, the Sixth Circuit holds that "[w]hile *Tinker* requires schools to demonstrate a 'material

and substantial interference' with the educational process in order constitutionally to silence a student on the basis of the student's particular viewpoint," a school district "need not satisfy this demanding standard merely to impose a viewpoint-neutral regulation" of student speech. *M.A.L.* v. *Kinsland*, 543 F.3d 841, 850 (6th Cir. 2008); *accord Blau* v. *Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391-93 (6th Cir. 2005).

In sharp conflict, the Third Circuit holds that *all* student speech "falling outside" of the narrow categories of speech recognized by this Court "is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others." *Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.). The Second Circuit has held likewise, while acknowledging the "lack of clarity" on the issue. *Guiles* v. *Marineau*, *supra*, at 326 ("*Tinker* applies to all non-school-sponsored student speech that is not lewd or otherwise vulgar").

Indeed, those courts have vindicated student-speech rights under circumstances far less constitutionally compelling than those presented here, which involve quintessentially political, admittedly inoffensive, and indisputably non-disruptive speech. In *Guiles* v. *Marineau*, for example, a middle-school student wore a shirt emblazoned with words and images denigrating then-President George W. Bush by, among other things, referring to him as "Chicken-Hawk-in-Chief" and including images of cocaine, a

martini glass, dollar signs, and oil rigs. *Id.* at 322. School officials decided that the shirt violated the school's dress code. *Ibid.* The Second Circuit, however, decided that the school had violated the student's free-speech rights. *Id.* at 331.

Concluding that the images of drugs and alcohol were not offensive because they were anti-drug and combined with a political message, the Second Circuit rejected the applicability of *Fraser*, noting "the absence of any political message in Fraser's speech." *Id.* at 330. Because the speech was not school-sponsored, *Hazelwood* did not apply. *Id.* at 327. Instead, the longstanding *Tinker* rule applied. *Id.* at 330. Because the speech caused no disruption, the Second Circuit held that the school violated the student's speech rights in censoring that speech. *Id.* at 331; see also *Newsom* v. *Albermarle County Sch. Bd.*, 354 F.3d 249, 252, 259 (4th Cir. 2003) (holding that middle-school principal's ban on a student's pro-National Rifle Association shirt that "depicted three black silhouettes of men holding firearms" was impermissible because there was no evidence that the NRA shirt "ever substantially disrupted school operations or interfered with the rights of others").

Similarly, the Seventh Circuit, in *Nuxoll* v. *Indian Prairie School District*, 523 F.3d 668 (7th Cir. 2008), reversed the denial of a preliminary injunction and compelled the school district to allow a high school student to wear a shirt in school bearing the legend "Be Happy, Not Gay." The school had prohibited the student from wearing the shirt as a

violation of its policy prohibiting "derogatory comments, oral or written, that refer to race, ethnicity, religion, gender, sexual orientation, or disability." In an opinion authored by Judge Posner, the Seventh Circuit concluded that the school's restriction on student speech could not be justified as a foreseeable "substantial disruption" under *Tinker*. A federal district court in Florida reached a similar conclusion regarding pro-gay symbols such as rainbows and pink triangles. *Gillman* v. *Sch. Bd. for Holmes County, Fla.*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

Those decisions are difficult to square with the Fifth Circuit's in this case. If the First Amendment requires school districts in the Second Circuit to allow non-disruptive student speech on clothing expressing disapproval of a sitting president, then it is difficult to understand how the First Amendment can permit school districts in the Fifth Circuit to censor non-disruptive student speech expressing support for a presidential candidate when the Fifth Circuit has concluded that the speech is not disruptive.

To be sure, speech that cannot be proscribed constitutionally by school officials in one circumstance may nonetheless be prohibited in another—but that distinction turns on the speech's potential for *disruption*, which indisputably is not present here. See, e.g., *Barr* v. *Lafon*, 538 F.3d 554, 564 (6th Cir. 2008) (pet. filed, April 22, 2009) (holding that ban on wearing or displaying the Confederate flag was justified under *Tinker* because the ban was "necessary to avoid material and substantial interference with

schoolwork or discipline") (quoting *Tinker*, 393 U.S. at 511).

The Fifth Circuit has further entrenched the split by expressly holding, in agreement with the Ninth and Sixth Circuits (but in conflict with the Second and Third), that the *Tinker* framework does not apply when restrictions on pure student speech are content- and viewpoint-neutral. The conflict is mature, significant, and irreconcilable. Further percolation will not assist the Court in resolving it. The Court's review is needed now to settle the important legal issues at stake and provide clarity about the scope of student-speech rights for students, parents, and school officials alike.

This case squarely presents the issue on which the lower courts have divided almost evenly, thereby presenting the Court with a much-needed opportunity to resolve the conflict illuminated but not settled by *Morse* (and to eliminate confusion on the part of school boards, administrators, teachers, and students). It also implicates precisely the concerns expressed by Justices Alito and Kennedy in their concurring opinion in *Morse* about unnecessarily broad restrictions on student speech.

As their concurring opinion explains, "public schools are invaluable and beneficent institutions, but they are, after all, organs of the State." *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring). In particular, the concurring opinion cautioned about the

notion that "educational mission" is a panacea allowing for virtually unlimited curtailment of student speech:

> This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

Ibid. (Alito, J., concurring). The school district has explicitly taken the position that it may allow speech that "promotes" its educational mission while prohibiting speech that, in the school district's view, does not—precisely the sort of restriction singled out by the concurring opinion as raising particular concern. See *ibid.*; see also *Harper*, 445 F.3d at 1196 n.7 (Kozinski, J., dissenting) (admonishing that "one man's civic responsibility is another man's thought control").

This case is an ideal vehicle for resolving the conflict among the lower courts, clarifying the constitutional limits on student-speech restrictions, and re-affirming the long-recognized role of public schools in educating youth for responsible citizenship—a vital mission that cannot be achieved without "scrupulous protection of Constitutional freedoms of

the individual." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943); see also *Hodgkins ex rel. Hodgkins* v. *Peterson*, 355 F.3d 1048 (7th Cir. 2004) (Rovner, J.) ("We not only permit but expect youths to exercise those liberties—to learn to think for themselves, to give voice to their opinions, to hear and evaluate competing points of view—so that they might attain the right to vote at age eighteen with the tools to exercise that right."). The Fifth Circuit expressly acknowledged that its treatment of the issue was outcome-determinative, given the school district's stipulations that Pete's political speech was not disruptive. Nothing will be gained by waiting for another case to present similar issues. This case is an optimal vehicle for resolving an important, recurring issue of constitutional law that affects students, parents, and school officials across the Nation.

II. THE APPLICATION OF *O'BRIEN* IN THE DECISION BELOW SHARPLY DEPARTS FROM LONG-ACCEPTED FIRST AMENDMENT PRINCIPLES

The Fifth Circuit's determination that intermediate scrutiny can properly be applied to restrictions on pure student speech should, as explained above, be reviewed (and ultimately reversed) by this Court. Even if intermediate scrutiny could be applied in this context, however, the Fifth Circuit's understanding of that standard in this case—which, despite purporting to be intermediate scrutiny, effectively operates as rational basis review, if that—is in direct

conflict with this Court's cases establishing the standards applicable to regulations governed by intermediate scrutiny. The Fifth Circuit's lenient review of government censorship sets an exceptionally dangerous precedent that, if permitted to stand, would vest government-run schools with virtually unfettered authority to censor speech.

What is more, there is no principled basis for limiting the Fifth Circuit's analysis to the context of student speech. Because the Fifth Circuit's application of intermediate scrutiny is not only erroneous, but also sets a dangerous example for other courts to follow, this Court may wish to consider summary reversal. At a minimum, the Court should grant review to provide much-needed guidance on the proper application of intermediate scrutiny in the public school setting, particularly if it is to be applied to all "content neutral" restrictions on pure speech, such as the written word, and not merely expressive conduct.

It is settled law that under intermediate scrutiny, the government bears the burden of demonstrating that a speech regulation (1) must be "within the constitutional power of the Government;" (2) must "further[ ] an important or substantial governmental interest;" (3) "the governmental interest" must be "unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms" must be "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. As applied by the Fifth Circuit in this case,

however, that scrutiny was effectively diluted to mere rational-basis review, at most.

First, the court of appeals impermissibly supplied hypothetical justifications for the school district's censorship that not even the school district advanced. See App. 15-18; see also *Annex Books, Inc.* v. *City of Indianapolis*, ___ F.3d ___, No. 05-1926, 2009 WL 2855813, at *3 (7th Cir. Sept. 3, 2009) (Easterbrook, J.) (distinguishing intermediate scrutiny from the "rational-relation test," under which "all a court need do is ask whether a sound justification of a law may be imagined"). For example, the court of appeals hypothesized—without addressing the school district's actual interpretation of its policy as permitting political messages when on bumper stickers stuck on shirts, but prohibiting political messages when printed on shirts—that the school's interest in "promoting professional and responsible dress" still "functions" because "students are prepared for a working world in which pins and buttons may be appropriate at work but large, stark political message t-shirts usually are not." App. 18.

The court of appeals did not explain how a policy that, by the school district's own admission, would permit an unlimited number of bumper stickers and buttons of all sizes and shapes—even "pie"-sized buttons—to be stuck on student clothing, while prohibiting political writing printed on student clothing, actually *furthers*, as intermediate scrutiny requires, *any* governmental interest, much less one in promoting "professional and responsible dress." Nor

did the court of appeals explain how a policy that allows messages on t-shirts supporting the school's football team or cheerleading squad, while prohibiting messages on t-shirts expressing support for presidential candidates or the text of the First Amendment, furthers any such interest. See *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 100 (1972) (striking down ordinance banning all picketing except for labor picketing outside public schools and explaining that "[i]f peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful" even under *O'Brien*'s intermediate scrutiny standard).

The court of appeals did not even attempt to scrutinize the speech restriction actually challenged by Pete: WISD's policy of making exceptions to its ban on "slogans, words, and symbols" deemed by school officials to promote the school district and its instructional mission, such as messages supporting curricular clubs, athletic teams, and school "spirit," but refusing to make similar exceptions for Pete's undisruptive, core political speech—in short, why a policy banning some words and allowing others approved by the government is content neutral.[2]

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[2] The restriction on speech unanimously struck down by the Court in *Board of Airport Commissioners of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987), was by any measure far more neutral than the regulation upheld here. The regulation in *Jews for Jesus* even-handedly banned all "First Amendment activities by any individual and/or entity." *Id.* at 570-71. That

(Continued on following page)

Such deference to government, even in the school setting, is wholly incompatible with intermediate scrutiny, properly applied. See, e.g., *Hodgkins*, 355 F.3d at 1048 (holding that youth curfew policy could not survive intermediate scrutiny in First Amendment challenge because it was not sufficiently narrowly tailored to further the government's important and substantial interests).

Similarly inappropriate was the court of appeals' demand that *Pete* "show that the button allowance *destroys* all of the District's stated important governmental interests." App. 18. The court of appeals' analysis is exactly backwards: Under intermediate scrutiny, it is the *government*'s burden to show that the restriction *furthers* its interests. The Fifth Circuit did not appear even to consider whether, as intermediate scrutiny requires, the government had shown its restriction on Pete's political speech was no greater than necessary to further the government's stated interests. Instead, it asked a very different question: Whether those stated interests still "function" in light of the differential treatment accorded Pete's political speech under the policy. See *ibid.* That is not the test under intermediate scrutiny, because the First Amendment requires more. See *Int'l*

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ban was impermissible, this Court explained, in part because "[m]uch nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—* * * is still protected speech even in a nonpublic forum." *Id.* at 576 (citing *Cohen* v. *California*, 403 U.S. 15 (1971)).

Soc'y for Krishna Consciousness v. *Lee*, 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring) (warning against "convert[ing] what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat").

The Fifth Circuit's dilution of intermediate scrutiny in the course of upholding the school district's censorship of Pete's political speech would be troubling enough were it limited to the school context, or to "dress codes," or to expressive conduct. But it is not. And there is no principled basis for doing so. This Court's intervention is therefore needed not only to clarify the permissible grounds upon which student speech in government-run schools may be restricted, but also to ensure that the Fifth Circuit's erroneous application of intermediate scrutiny in this case does not extend the reach of government's ability to regulate protected speech into other contexts to which intermediate scrutiny applies, as well.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. The Court may also wish to consider summary reversal.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-10903

PAUL T. PALMER, by and Through His Parents and Legal Guardians, Paul D. Palmer and Dr. Susan Gonzalez Barker,

Plaintiff-Appellant,

versus

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(Filed Aug. 13, 2009)

Before HIGGINBOTHAM, SMITH and SOUTHWICK, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Paul Palmer, a student at Waxahachie High School, submitted three shirts for approval under the dress code of Waxahachie Independent School District ("the District"), whose administration told Palmer the shirts violated the code and could not be worn to school. Palmer sued and requested a preliminary

injunction, which the district court denied. He appeals, and we affirm.

I.

On September 21, 2007, Palmer, then a sophomore, went to school wearing a shirt with "San Diego" written on it. Assistant Principal Johnson told Palmer his shirt violated the District's dress code,[1] which did not allow t-shirts with printed messages. Palmer called his parents, who brought him a "John Edwards for President '08" t-shirt to wear instead. Johnson said Palmer would not be allowed to wear that shirt either, because it contained a printed message. Palmer appealed the decision to Principal David Nix, who denied the appeal, and that denial was sustained by the District's Superintendent, Thomas Collins.

On April 1, 2008, Palmer sued the District under 42 U.S.C. § 1983, alleging that the dress code violated his freedom of speech under the First Amendment. He asked for declaratory relief under 28 U.S.C. § 2201, a preliminary injunction, a permanent injunction, nominal damages, and attorneys' fees. The District answered that Palmer's shirt violated the dress code even though it did not pose a concrete threat of

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[1] This version of the dress code did not allow students to wear messages on t-shirts unless they were in connection with a club, sports team, university, or school spirit. It allowed students to wear polo shirts with messages.

substantial disruption, was not sexually explicit, was not school-sponsored speech, and did not promote illegal drug use.

The district court held a hearing on May 8 on Palmer's motion for preliminary injunction. District Assistant Superintendent David Truitt testified that, four days before the hearing, the District had adopted a new dress code for the upcoming school year. Because of the new code, the court dismissed Palmer's motion without prejudice but asked the District for a copy of the new code.

On May 19, the District submitted its new dress code, which restricted more speech, including polo shirts with messages, shirts with professional sports team logos, and clothing with university messages. The policy continued to permit "campus principal-approved [District] sponsored curricular clubs and organizations, athletic teams, or school 'spirit' collared shirts or t-shirts." It also allowed logos smaller than two inches by two inches.[2]

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[2] The District claimed that it adopted the stricter dress code to meet several problems. First, it had found that teachers and administrators spent too much time enforcing the old code, and the District believed the new one would be easier to enforce. Second, it banned professional sports shirts and university shirts because students had worn them to promote gang affiliation. Third, it found that neighboring school districts had used similar dress codes that had been successful. Finally, the District noted that it had considered adopting school uniforms but decided not to do so, because it still wanted students to have some freedom to chose [sic] their clothing.

After receiving the dress code, Palmer submitted three shirts to the District for approval. One was the original John Edwards for President t-shirt, one was a John Edwards for President polo shirt, and one was a t-shirt with "Freedom of Speech" on the front and the text of the First Amendment on the back. The District rejected all three.

Palmer again sued, and Truitt again testified, admitting that the dress code did not ban political pins, buttons, bumper stickers, or wrist bands and stating that those would be analyzed under the District's policy of not allowing any item that is distracting, sexually explicit, or promoted a violation of school rules. The district court determined that Palmer had not shown that he would suffer irreparable harm because of the dress code and denied a preliminary injunction.

II.

We review the denial of a preliminary injunction for abuse of discretion. *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163 (5th Cir. 1993). We evaluate *de novo* the legal principles on which the decision is grounded. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007) (citation omitted). A district court should issue a preliminary injunction only if the plaintiff establishes

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that

> the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Byrum v. Landreth, 566 F.3d 442, 445 (5th Cir. 2009) (citing *Speaks v. Kruse,* 445 F.3d 396, 399-400 (5th Cir. 2006)). The district court examined only the second prong and concluded that Palmer did not "satisf[y his] burden of proving irreparable injury in light of the Court's determination that the school district will not [prevent Palmer] or other students from conveying political messages via bumper stickers affixed to their clothing, or buttons to do the same."

The "loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Deerfield Med. Ctr. v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981) (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). Because "[w]ords printed on clothing qualify as pure speech and are protected under the First Amendment," the dress code's ban on his shirts would cause Palmer irreparable injury. *Canady v. Bossier Parish Sch. Bd.,* 240 F.3d 437, 440 (5th Cir. 2001) (citations omitted). The analysis is no different just because the code permits buttons and stickers. Therefore, the district court abused its discretion in deciding that the District's enforcement of the dress code could not irreparably harm Palmer.

III.

A.

Both parties ask that we examine the first prong, whether there is "a substantial likelihood of success on the merits." We may do so, because "it is an elementary proposition, and the supporting cases too numerous to cite, that this court may affirm the district court's judgment on any grounds supported by the record." *United States v. Dunigan,* 555 F.3d 501, 508 n.12 (5th Cir.) (citation omitted), *cert. denied,* 129 S. Ct. 2450 (2009).

B.

Although students in public schools have First Amendment rights, this "constitutional protection is not absolute." *Canady,* 240 F.3d at 441. "[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Morse v. Frederick,* 127 S. Ct. 2618, 2621 (2007) (citation omitted).

The Supreme Court has issued four major opinions on public school regulation of student speech. First, in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), a public school punished students who wore black armbands to school to protest the Vietnam War. *Id.* at 504. The Court confirmed that "students [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id.* at 506, and "[i]n the absence of a specific showing of constitutionally valid

reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 511. Schools can restrict student speech only if it materially interferes with or disrupts the school's operation, *id.* at 512, and cannot "suppress 'expressions of feelings with which they do not wish to contend.'" *Id.* at 511 (citing *Burnside v. Byars,* 363 F.3d 744, 749 (5th Cir. 1966)).

Since *Tinker,* every Supreme Court decision looking at student speech has expanded the kinds of speech schools can regulate. In *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 687 (1986), the Court ruled that schools can prohibit "sexually explicit, indecent, or lewd speech." The Court held in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 271-73 (1988), that schools can also regulate school-sponsored speech. Finally, in *Morse v. Frederick,* 127 S. Ct. 2618 (2007), the Court determined that schools can prohibit "[s]peech advocating illegal drug use." *Id.* at 2638 (Alito, J., concurring).

Palmer argues that under these decision, he wins on the merits. Reading *Tinker, Fraser, Hazelwood,* and *Morse* together, Palmer believes the Court has established a bright-line rule that schools cannot restrict speech that is not disruptive, lewd, school-sponsored, or drug-related. If this were the rule, Palmer indeed would prevail, because the District has stipulated that his shirts do not fall into any of these categories. Palmer's proposed categorical rule, however, is flawed, because it fails to include another type

of student speech restriction that schools can institute: content-neutral regulations.

In *Canady,* the plaintiff presented this court with the same categorical argument that Palmer makes, in a facial challenge to a school uniform code. The plaintiff argued that uniforms violated the First Amendment because they banned student clothing that was not disruptive, lewd, or school-sponsored. Judge Parker, writing for the court, recognized that the Supreme Court had established these categories for situations in which schools were targeting specific speech but that content-neutral regulations "do not readily conform to [any] of the three categories addressed by the Supreme Court." *Canady,* 240 F.3d at 442. These cases all addressed "disciplinary action by school officials directed at the political content of student expression," not content-neutral regulations such as school uniforms. *Id.* at 442-43.

Because the regulation was content-neutral, we held that it should be analyzed under the rules of "the traditional time, place and manner analysis and the *O'Brien* test for expressive conduct." *Id.* at 443; *see United States v. O'Brien,* 391 U.S. 367 (1968). "Thus, the School Board's uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest." *Id.* (citation omitted). This court concluded that viewpoint- and content-neutral school dress

codes should be reviewed under intermediate scrutiny.[3]

Palmer and *amici* vigorously argue that intermediate scrutiny should not apply to student speech, because the Supreme Court has never used that standard when reviewing such cases. The American Center for Law and Justice, as *amicus,* notes that *O'Brien* predates *Tinker,* and thus the Court implicitly rejected intermediate scrutiny for student speech cases when it declined to use it in *Tinker.* These arguments, however, overlook our rule of orderliness, which "forbids one of our panels from overruling a prior panel."[4] "Although it would be fair . . . to debate whether" intermediate scrutiny should ever apply to student speech, "that debate already took place"[5] in *Canady,* so we follow that decision. In addition, *Canady* has been followed by three other circuits[6] and

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[3] For the remainder of this opinion, we use "intermediate scrutiny" to refer to the time, place, manner, or *O'Brien,* tests referred to in *Canady.*

[4] *Pretus v. Diamond Offshore Drilling, Inc.,* 571 F.3d 478, 487 (5th Cir. 2009) (Smith, J., dissenting) (quoting *Teague v. City of Flower Mound, Tex.,* 179 F.3d 377, 383 (5th Cir. 1999)).

[5] *Id.* at 488 (Smith, J., dissenting).

[6] *See Bar-Navon v. Brevard County Sch. Bd.,* 290 F. App'x 273, 276-77 (11th Cir. 2008); *Jacobs v. Clark County Sch. Dist.,* 526 F.3d 419, 428-32 (9th Cir. 2008); *Blau v. Fort Thomas Pub. Sch. Dist.,* 401 F.3d 381, 390-93 (6th Cir. 2005).

has effectively become the national standard for analyzing content-neutral student speech.[7]

Palmer presents several arguments for why *Canady,* despite being our controlling precedent, should not apply in this case. First, he claims that Justice Alito's concurrence in *Morse* overruled *Canady.*[8] *Morse,* however, involved a school's targeting specific speech and did not concern content-neutral regulations. That distinction is critical and controlling. In addition, Justice Alito never mentioned *Canady* or any similar case and in fact recognized that *Tinker* "does not set out the only ground on which in-school student speech may be regulated." *Morse,* 127 S. Ct. at 2637 (Alito, J., concurring). Nothing in Justice Alito's concurrence or the majority opinion in *Morse* overruled *Canady.*[9]

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[7] Amicus Walter Bateman's request that we follow Judge Thomas's dissent in *Jacobs*—which suggests that "the Supreme Court has consistently focused on the *nature of the speech itself,*" rather than the regulation—runs afoul of *Canady. See Jacobs,* 526 F.3d at 442-43 (Thomas, J., dissenting). That argument, moreover, does not properly distinguish between regulations that suppress specific speech and content-neutral regulations. In cases reviewing content-neutral time, place, manner restrictions, the Supreme Court has examined the regulations, not the speech being regulated. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791-803 (1989).

[8] In *Ponce v. Socorro Independent School District,* 508 F.3d 765, 768 (5th Cir. 2007), we recognized that Justice Alito's concurrence is "controlling" for our interpretations of *Morse.*

[9] Palmer's argument that our decision in *Ponce* overruled *Canady* is similarly incorrect. That case interpreted *Morse* and

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Next, Palmer posits that *Canady* does not govern our case, because it examined a uniform code rather than a dress code. This is a distinction without a difference, because a uniform code is merely a strict version of a dress code.

Palmer's distinction would require that federal judges decide when a dress code is strict enough to be considered a uniform and would spawn endless line-drawing litigation. In addition, it would punish those school districts that adopt dress codes rather than uniforms because their students cannot afford uniforms. Also, such a rule would have the perverse result of pushing schools to adopt uniforms rather than dress codes that give students some clothing choice.

Palmer also argues that this case differs from *Canady* because it is an as-applied, rather than facial, challenge to the dress code. This fact does not change our standard of review. When analyzing time, place, and manner restrictions, we have used intermediate scrutiny for as-applied challenges, not just facial challenges.[10] The reason is obvious—to review facial challenges for a dress code under intermediate scrutiny while reviewing as-applied challenges for strict scrutiny would make no sense and would

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examined a school's suppression of dangerous speech, not content-neutral regulations.

[10] *See, e.g., United States v. Hicks*, 980 F.2d 963, 970-71 (5th Cir. 1992) (analyzing as-applied challenge to statute under intermediate scrutiny).

effectively destroy any content-neutral regulation that could possibly ban political speech. Challenges to content-neutral dress codes, whether facial or as-applied, are reviewed under intermediate scrutiny.

In summary, because *Canady* survives *Morse* and applies to all content-neutral challenges, school regulation of student speech can be justified on five—not just four—grounds. If the speech is disruptive (*Tinker*), lewd (*Fraser*), school-sponsored (*Hazelwood*), or promoting drug use (*Morse*), schools may in some instances restrict specific student speech. Student speech can also be regulated so long as the regulation is viewpoint- and content-neutral (*Canady*).

C.

We must decide whether the District's dress code is content-neutral. The District does not allow messages on shirts, but it exempts small logos on shirts and "campus principal approved" shirts that promote school clubs, organizations, athletic teams, or "school spirit." Palmer argues that the dress code's exemption for small logos and school-sponsored shirts by definition violates content-neutrality, because it distinguishes based on content. Similar allegedly-content-based dress code exceptions have been examined by

three other federal courts and found to be content-neutral.[11]

Palmer's argument regarding content-neutrality has some judicial support. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642-43 (1994) (citations omitted). A dress code "is content based if . . . it differentiates based on the content of the speech on its face." *Jacobs*, 526 F.3d at 444 (Thomas, J., dissenting).

The District's code, however, is content-neutral. In its preeminent case on content-neutral regulation, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), the Court stated that "[t]he principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." The Court has reiterated this

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[11] *See Jacobs*, 526 F.3d at 432-33; *Lowry v. Watson Chapel Sch. Dist.*, 508 F. Supp. 2d 713, 719 (E.D. Ark. 2007), *aff'd*, 540 F.3d 752 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1526 (2009); *Long v. Bd. of Educ.*, 121 F. Supp. 2d 621, 625 n.5 (W.D. Ky. 2000), *aff'd*, 21 F. App'x 252 (6th Cir. 2001). *But cf. Blau*, 401 F.3d at 391 (noting that appellant did not argue content-neutrality of dress code that allowed for "any logos larger than the size of a quarter save for Highlands logos or other 'Highlands Spirit Wear' ").

principle.[12] "[A] regulation is generally 'content-neutral' if its restrictions on speech are not based on disagreement with the message it conveys." *Brazos Valley Coal. for Life, Inc. v. City of Bryan, Tex.*, 421 F.3d 314, 326-27 (5th Cir. 2005) (citations and footnote omitted).

The District was in no way attempting to suppress any student's expression through its dress code—a critical fact based on earlier student speech cases—so the dress code is content-neutral. Its allowance for school logos and school-sponsored shirts does not suppress unpopular viewpoints but provides students with more clothing options than they would have had under a complete ban on messages. We therefore employ intermediate scrutiny.

D.

Under intermediate scrutiny, "the School Board's uniform policy will pass constitutional scrutiny [1] if it furthers an important or substantial government interest; [2] if the interest is unrelated to the suppression of student expression; and [3] if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest."

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[12] *See, e.g., Hill v. Colorado*, 530 U.S. 703, 719 (2000) (reaffirming *Ward*); *Turner*, 512 U.S. at 641 (stating that the First Amendment is concerned with "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas").

Canady, 240 F.3d at 443.[13] Palmer does not contend that the dress code violates the second prong but argues only on the first and third prongs.

Palmer asserts that the code does not further an important or substantial governmental interest. The code's preamble states that the code was adopted "to maintain an orderly and safe learning environment, increase the focus on instruction, promote safety and life-long learning, and encourage professional and responsible dress for all students." The District notes that the code would reduce administrative time spent enforcing the code and promote the school and its activities.

"Improving the educational process is undoubtedly an important interest." *Canady,* 240 F.3d at 443 (citation omitted). Improving student test scores and reducing disciplinary infractions qualify as important governmental interests. *Id.* Improving student performance, instilling self-confidence, increasing attendance, decreasing disciplinary referrals, and lowering the drop-out rate are all important governmental interests that meet the first prong's requirement. *Littlefield v. Forney Indep. Sch. Dist.,* 268 F.3d 275, 286 (5th Cir. 2001) (citations omitted). Importantly, this list of recognized interests is not exhaustive, and

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[13] The *O'Brien* test also requires that the government have the power to enact a given regulation, but in all dress codes cases this prong is, of course, automatically met. *See Jacobs,* 526 F.3d at 434 n.33.

federal courts should give substantial deference to schools where they present their reasons for passing a given dress code.[14]

Under our precedents, the District's stated interests all qualify under the first prong. The stated benefits for the students, such as providing a safer and orderly learning environment and encouraging professional dress, are all sufficient interests. "[I]t is hard to think of a governmental interest more important than the interest in fostering conducive learning environments for our nation's children." *Jacobs*, 526 F.3d at 435-36. The benefits for the school, such as reducing time spent enforcing the code and promoting school spirit, are also important in promoting better education. The District and its administrators—not federal judges—are in a better position to formulate a dress code, and we are understandably hesitant to question their stated justifications. *See Canady*, 240 F.3d at 444.

The District has provided more than enough evidence to establish its important governmental

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[14] *See Hazelwood*, 484 U.S. at 267 ("'[T]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,' rather than with the federal courts." (citing *Fraser*, 478 U.S. at 683); *Littlefield*, 268 F.3d at 287 ("[F]ederal courts should defer to school boards to decide, within constitutional bounds, what constitutes appropriate behavior and dress in public schools." (citations omitted); *Canady*, 240 F.3d at 444 ("[I]t is not the job of federal courts to determine the most effective way to educate our nation's youth.").

interests. In *Canady* and *Littlefield,* this court properly set a low bar for the evidence a district must submit to show its dress code meets its stated goals. A statistical showing that the code has improved test scores or lowered disciplinary actions is sufficient. *Id.* at 443-44. Additionally, evidence of improvements in other districts that have adopted the same or a similar dress code can support the district's decision. *Littlefield,* 268 F.3d at 286 n.16.

We do not, however, require statistical or scientific evidence to uphold a dress code; improvements in discipline or morale cannot always be quantified. The sworn testimony of teachers or administrators would also suffice. Again, they are in a better position than are we to determine the benefits of the dress code. Here, Assistant Superintendent Truitt testified that the school board had examined over forty other dress codes to see which would be the best fit for the District; the board took trips to see dress code enforcement in action and reviewed data regarding the impact of codes on other schools. This is more than enough to show that the District justified its important governmental interest with factual support.

Palmer does not take issue with the school board's claimed interests but instead argues that these interests do not apply, because the board's ban on shirts is undermined by allowing students to wear pins, buttons, wrist-bands, and bumper stickers containing messages. Generally, Palmer believes that allowing messages on buttons destroys the benefit of the dress code and its banning of messages on

shirts.[15] For Palmer's objection to stand, however, he would have to show that the District's button allowance destroys all of the District's stated important governmental interests; if any of those stated benefits remain, then the dress code—button/shirt distinction and all—is valid.

The District's stated benefits function under this distinction. Because shirts are large and quite visible, banning them while allowing buttons would still cause less distraction and promote an orderly learning environment. Buttons and pins are also less prominent than are shirts and therefore require less attention from and regulation by teachers. Another District goal—promoting professional and responsible dress—still functions as well, because students are prepared for a working world in which pins and buttons may be appropriate at work but large, stark political message t-shirts usually are not.

Most importantly, even if, *arguendo,* we were to find the distinction between messages on shirts and messages on buttons odd, we recognize that the teachers and administrators who establish these rules know better than do we how the distinction will

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[15] The court in *Jacobs,* 526 F.3d at 435, held that for the first prong of intermediate scrutiny, the court must take the government's stated interests at face value and cannot analyze the plaintiff's challenges to those interests. Because this position has no basis in law, we disagree with it and analyze Palmer's allegations that the dress code does not actually support the District's purported interests.

function in schools. "[F]ederal courts should defer to school boards to decide . . . what constitutes appropriate behavior and dress in public school." *Littlefield*, 268 F.3d at 287. The determination of where to draw lines on dress code decisions "properly rests with the school board, rather than with the federal courts." *Hazelwood*, 484 U.S. at 266 (citation, brackets, and internal quotation marks omitted).

Finally, we reject Palmer's "somewhat ironic[]" argument that the dress code "is an unconstitutional abridgment of speech because it does not abridge enough speech." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 540 (1981) (Stevens, J., dissenting in part). Under the current dress code, Palmer can come to school with a "John Edwards for President" button or First Amendment wrist-band and express his views through these devices. But Palmer requests that we strike down the dress code *because* the District gave him this avenue to express himself. He argues that, to survive intermediate scrutiny, the code must allow him no options at all.

We decline to follow this perverse reasoning. Under Palmer's rule, school districts would rush to impose the strictest dress codes possible or merely require school uniforms. Students such as Palmer would never be able to express their views through

any medium. We eschew any legal principle that would lead to such a race-to-the-bottom.[16]

Also, because we review dress codes for intermediate scrutiny, such a rule would be particularly unreasonable. Under the third prong of intermediate scrutiny, the District must show that its dress code is no more strict than necessary to achieve its goals. In *Canady,* 240 F.3d at 443, we expressly noted that allowing speech through "other mediums during the school day" ensured that a dress code did not violate this third prong. Yet, under Palmer's argument, if a school allowed certain other speech mediums, in order to survive scrutiny under the third prong, that allowance could cause the entire code to fail under the first prong. We decline the invitation to impose such a Catch-22 on school districts.

Lastly, Palmer argues that the dress code fails under the third prong, which requires that "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Turner,* 512 U.S. at 662. In *Canady,* however, we noted that a dress code

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[16] There are certain situations in which allowing more speech can cause a regulation to violate the First Amendment. Indeed, were the District's additional permitted speech specific to one particular viewpoint—say a rule that only allowed pro-abortion buttons—this could run afoul of the First Amendment. Our situation, however, is different: The District is not providing a right for student speech on a given topic, but instead is providing students a limited means to express their views on any topic.

passes this third prong so long as students "remain free to wear what they want after school hours" and "may still express their views through other mediums during the school day." *Canady,* 240 F.3d at 443. In addition, in *Littlefield,* 268 F.3d at 287, this court said that a dress code whose restrictions "pertain only to student attire during school hours and do not affect other means of communication" does not run afoul of the third prong. Thus, under our precedent, so long as a dress code does not restrict student dress outside of school and provides them with some means[17] to communicate their speech during school, it passes the third prong. The District's code fits easily within this rule, so it passes intermediate scrutiny.

In summary, Palmer has not shown a likelihood of success. There is no abuse of discretion, and the order denying a preliminary injunction is AFFIRMED.

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[17] The means do not necessarily have to be related to messages on clothing or buttons. Instead, schools can allow students to communicate their messages through other avenues, such as orally at school or through their written work.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PAUL T. PALMER, by and through his parents and legal guardians, Plaintiff, VERSUS WAXAHACHIE INDEPENDENT SCHOOL DISTRICT, Defendant.	(CIVIL ACTION (NUMBER (3:08-CV-0558-m ((((August 15, 2008 (9:00 a.m. (

TRANSCRIPT OF SECOND MOTION
FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE

(Filed Aug. 21, 2009)

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[68] THE COURT: Well, I have to say I'm disappointed about where we are. I think this is a legitimate issue of constitutional magnitude, whether a student can wear a T-shirt or a pin or a button or a bumper sticker that conveys a political message in the context of a school dress code or uniform policy. That is a legitimate question that should be determined by a higher court than me ultimately.

I sensed – and I didn't intend it to be a gotcha when we were here the last time. The air sort of went out of the room over here on the right side, because these cases come along rarely, and there they were, all young energetic lawyers all teed up to take a trip to the Fifth Circuit, and maybe to the big house. I was just sort of a little passing [69] stop along the way. I wasn't offended by that. Lo and behold I read the policy a little too carefully, and found out there really wasn't an issue there. I thought we were passed that, and here we are again.

I sure would like this issue to be teed up so I can write an opinion and it could go upstairs and maybe I could win Justice Scalia's little award that he gives at the Fifth Circuit Judicial Conference.

Just in case anyone doesn't know, that's when the trial court is reversed by the Fifth Circuit, and then the Supreme Court reinstates the wise and prudent decision of the District Court. I'm waiting for that to happen to me some day, and Justice Scalia to hand out that bird call that he passes out at the Fifth Circuit, but it's not going to happen today.

I think the issue on the merits, if Mr. Palmer were prohibited from communicating those messages, is a close question. I have reviewed the law that you have cited to me. My tentative ruling on that would be a ruling for the defense, but I think it is a close question.

I think the Jacobs case is well analyzed and well written. I will note that there is a significant

distinction in the Jacobs case that Judge Hawkins emphasizes, and that is the only verbiage that is permitted is the school logo. That's it's [sic]. It's just the school logo. It's not rah-rah [70] for the Spanish Club.

I didn't hear testimony, and I'm not satisfied really with the testimony about my example of the Gotham skeleton head Spanish club, because I don't think it's all that clear whether the school approval has to be of the club, or the school approval has to be of the shirt. But the issue of advocating political speech which is presented in this case seems to me to be overcome by the school district, which has not enforced this policy to date because of the timing, saying to me today that it is not going to prohibit Mr. Palmer from wearing a button or bumper sticker that advocates exactly what he wants to in the three permutations that are before the Court.

If it happens that Mr. Palmer is not permitted to do that, or if the school district prevents him from doing so, I will write an opinion on the merits so that it can be appealed. I don't need to have another hearing on this. You all have briefed this – I don't want to use the technical term, but I will – out the wazoo and I have read it and I understood the law. If there are new cases that come down, you will let me know. At this point I'm not going to enter a preliminary injunction, because I don't think that there is irreparable injury to the plaintiff given what I understand is the case.

I frankly would expect, and won't be surprised, if [71] Mr. Palmer shows up decorated with all kinds of bumper stickers advocating John Edwards and freedom of speech and so forth.

If the school district changes its policy, I'm requiring the school district to notify the Court immediately and requiring the parties to immediately advise the Court of what has happened and give the plaintiff permission to file a very brief supplement to the record and request injunctive relief again and I will rule quickly on it.

I'm just not going to do it today, because I don't think it's teed up for me to do it.

I will tell you, so there is no surprise about it, that my inclination on the merits is toward the defense, although I think it is a close question. I do not read Justice Alito's opinion in Morse to say that I cannot apply O'Brien in this context. I believe that the applicable test is O'Brien, even though to get there I have to ignore the distinction I mentioned to the extent I'm following Jacobs with respect to the language being limited to the logo. I think, as I say, it is a close question. It should be decided by the Circuit, and ultimately by the Supreme Court to the extent the Supreme Court hasn't already decided it.

I do not read Justice Alito's comments about there still being protected speech within the confines of a school to mean that a school district cannot have a policy which [72] prohibits students from applying to their dress – let me say that differently – from

wearing articles of clothing that convey a message that is not related to the business of education. I think that that is permissible under the cases as I have read them, and I don't think that Justice Alito's opinion in the context in which it was written holds otherwise, but this is an important question that ought to be adjudicated at least by the Circuit. If not by the Circuit, then by the Supreme Court.

I believe that the Circuit's dress code cases, I think are still good law. I know that counsel for the defense disagrees, and concludes that post Morse that we are now out of O'Brien and into Tinker only. If you're right, then if Mr. Palmer were prohibited from wearing a button or bumper sticker, then you would win.

I think it's clear that apart from this button, bumper sticker issue, the division of argument here is the plaintiffs' position is Tinker must apply, and if Tinker applies, this case doesn't fit within any of the categories, Tinker, Poolmeyer, Frasier, and therefore strict scrutiny applies, and the policy is invalid.

The defense position is that this is intermediate scrutiny at best, O'Brien, and under O'Brien the policy is a reasonable policy. I tend to agree that O'Brien is still the law that I would apply here.

[73] I will note that just as I did not find what happened before under the old policy to be terribly significant here, neither do I think it's terribly significant that a whole lot of school districts in North Texas have a similar policy.

That policy has not been adjudicated directly to be valid or invalid, and it doesn't matter to me if 100 school districts have the same policy. If it's right, it's right, if it's wrong, it's wrong, and you're not going to win it by there are a whole bunch of people doing the same. I think you're going to win it because it's right or not. If it's not, then you lose.

So the Court's ruling will be to deny the preliminary injunction. The Court concludes that the plaintiff has not satisfied its burden of proving irreparable injury in light of the Court's determination that the school district will not present Mr Palmer or other students from conveying political messages via bumper stickers affixed to their clothing, or buttons that do the same.

If that turns out not to be the case, or if the policy is later amended to prohibit that, the Court will welcome the parties to advise the Court, and quickly and briefly – I'm not saying that critically, I mean so that I can rule quickly – supplement the record with whatever has occurred since.

I'll have a hearing if I need to. If I don't, I will [74] rule promptly so that the matter can be teed up.

I don't have to write such a lengthy opinion that I'm going to leave you all delayed. The Circuit is clearly going to want to take a look at this issue. It's actually a pretty narrow question of whether O'Brien survives post Morse. I think that's really the key question.

So if we get a factual record that indicates that Mr. Palmer's and other's rights of political expression within the school district are not permitted to be pursued, then the Court will write an opinion and give the Circuit an opportunity to rule.

* * *

2008-2009 Secondary (Grades 6-12)
Student Dress Code
Waxahachie Independent School District

In order to maintain an orderly and safe learning environment, increase the focus on instruction, promote safety and life-long learning, and encourage professional and responsible dress for all students, all Waxahachie ISD secondary students (grades 6-12) must meet the expectations of the WISD Student Code of Conduct: Secondary Dress Code.

The campus principal or his/her designee will be the sole authority in deciding whether a student's dress complies with the Secondary Dress Code. Any violations of the Code must be immediately corrected at the direction of the campus principal or his/her designee.

Students, parents, teachers, and administrators must work together to assume responsibility for complying with and enforcing this Dress Code adopted by the Waxahachie ISD Board of Trustees.

General

- Students should be neatly dressed and may not wear torn or frayed clothing or clothing with holes. All apparel must be appropriately hemmed.
- The secondary campuses are a closed forum for student expression through student attire. This means that during the school day, student clothing should be free of any slogans, words or

symbols except those that promote the school district and its instructional programs.

- Students should come to school prepared to learn. Any aspect of a student's appearance or attire that is likely to distract or disrupt the learning environment, including images or messages that are lewd, vulgar, sexually suggestive, containing profanity, or promoting violation of school rules (such as promoting drug or alcohol use) are prohibited.
- All camouflage, all black, all red, all blue, etc. attire is prohibited.

Shirts, Tops, and Blouses

- Students may wear polo-style (knit) shirts, collared shirts, or blouses, Any manufacturer's logo must be 2" x 2" or smaller. Low-cut necklines, tank tops, spaghetti straps, and off-the-shoulder shirts, blouses, or sweaters are prohibited.
- Students may wear campus principal-approved WISD sponsored curricular clubs and organizations, athletic team, or school "spirit" collared shirts or t-shirts. Approved t-shirts must have rounded necklines. Throughout the school year, special dress days may be scheduled by the campus principal.
- Any shirts or tops that show the torso when arms are raised above the head are prohibited.

- For female students, all untucked shirts, tops, and blouses may not extend below the middle of the thigh.
- For male students, all shirts must be tucked into the pants or shorts.

Dresses, Skirts, Shorts, and Pants

- Students may wear shorts, pants, jeans, skirts, or dresses. Any manufacturer's logo must be 2" x 2" or smaller.
- Skirts, shorts and dresses must be longer than fingertip length when the arms are held at the student's side.
- Dresses with low-cut necklines, spaghetti straps, or off-the-shoulder sleeves are prohibited.
- Pants and shorts should fit properly and must be worn around the normal waist area; sagging pants or shorts are not allowed. For male students, a belt must be worn inside the belt loops and be visible at all times.

Game-Day Attire and Outerwear

- Students may wear WISD athletic team or extracurricular club/organization "game day" attire with the approval of the campus principal in connection with the sponsor, coach or other person in charge of the extracurricular activity.
- Students may wear only solid-colored sweatshirts, hooded sweatshirts, windbreakers, jackets, sweaters, turtlenecks, vests, or coats.

Any manufacturer's logo must be 2" x 2" or smaller. Hoods may not be worn indoors.

- Students may wear WISD letter jackets or campus principal approved WISD sponsored curricular clubs and organization, athletic team, or spirit sweatshirts or hooded sweatshirts.
- Oversized outerwear is prohibited.
- Professional/Collegiate athletic team coats or jackets, trench coats, dusters, and one-piece jump suits are prohibited.
- Athletic clothing, such as warm-up suits, sweat suits, sweat pants, athletic shorts, biker shorts, spandex, overalls, coveralls, soccer or boxer style shorts, and cotton pants with drawstrings or elastic waistbands are prohibited in the academic classroom.

Accessories

- Female students may wear earrings in their ears. All other visible pierced jewelry is prohibited. Students may not wear band-aides, plastic spacers, sticks, etc. to conceal piercings.
- Students may not wear scarves, hats, caps, hoods, sweat bands, or bandanas.
- Students may not wear chains, including those attached to pants or wallets.
- Students may not wear spiked or studded clothing, jewelry, or belts.

- Students may not wear sunglasses indoors, except with a signed note from the school nurse. All sunglasses must be placed out of sight.
- Students may not wear belt buckles larger than the size of the WISD ID card. Students may wear only solid-colored belts.

Footwear

- Students must wear shoes or sandals at all times. All footwear must be appropriately fastened or tied at all times.
- Students may not wear house shoes, shoes with metal cleats, taps, or wheels on the heels or soles, or shoes that can damage or mark campus floors.

Grooming

- Male students must keep all facial hair, mustaches, sideburns, goatees, and beards neatly groomed.
- Students may use natural colored hair dye. All colors that are not deemed natural color are prohibited. Tipping or highlighting hair is permitted as long as it is a natural hair color.
- Haircuts or styles such as Mohawks, spikes, or patterns are prohibited, including any patterns in eyebrows.

Exemptions

Parents or guardians seeking an exemption from the Secondary Dress Code for their student must complete a WISD Secondary Dress Code Exemption Request Form. This form is available upon request by mail or in person in the main office. The form is also available on the WISD website. The form must be completed in full and returned to the campus principal. The parent or guardian will be asked to discuss with the campus principal the reasons and goal of the policy and the nature of the objections to the Dress Code. This meeting shall be held within ten days after receipt of the form. Based on the information provided in the Exemption Request Form and the interview with the parent, the campus principal will make a determination as to whether the exemption is granted. This decision shall be provided to the student or parent within ten days following the conference. Parents with more than one student enrolled in the District must fill out a separate WISD Secondary Dress Code Exemption Request Form for each student.

Any appeal of the campus principal's decision will be treated as a student/parent or guardian complaint under WISD Board Policy FNG (LOCAL).

Unless otherwise approved by the campus principal, the student must continue to comply with the WISD

Secondary Dress Code pending the outcome of the Exemption Meeting.

Approved by the WISD Board of Trustees
on Monday, May 19, 2008

2007-2008 Secondary (Grades 6-12)
Student Dress Code
Waxahachie Independent School District

In order to maintain an orderly and safe learning environment, all Waxahachie ISD secondary students (grades 6-12) must meet the expectations of the *WISD Student Code of Conduct: Dress Code*.

The campus principal or his/her designee will be the sole authority in deciding whether a student's appearance is a distraction and might interrupt the learning process for other students. Any violations of this Dress Code must be corrected immediately at the direction of the campus principal or his/her designee.

Students, parents, teachers, and administrators must work together to assume responsibility for complying and enforcing this Dress Code adopted by the Waxahachie ISD Board of Trustees.

Shirts, Tops, and Blouses

- T-shirts, other than WISD clubs, organizations, sports, or spirit t-shirts, college or university t-shirts, or solid-colored t-shirts, are prohibited. Permitted t-shirts must have rounded necklines and sleeves or cap sleeves. The sleeves must be hemmed. Special t-shirt dress days will be scheduled throughout the school year. These special dress days must be approved by the campus principal.
- Polo-style shirts and shirts with collars are acceptable for boys and girls. Blouses or shirts

with low-cut necklines are prohibited. Tank tops, spaghetti straps, and off-the-shoulder shirts, blouses, or sweaters are prohibited. Shirts, blouses, and sweaters that show the torso when arms are raised above the head are prohibited. *All polo style (knit) shirts and shirts with collars containing pictures or slogans that are provocative, offensive, sexual or suggestive in nature, vulgar, lewd, or obscene are prohibited. Alcohol and tobacco pictures or slogans are also prohibited.*

- For girls, all un-tucked shirts, tops, and blouses may not extend below the middle of the thigh.
- All boys must tuck their shirts in their pants *or shorts. If the pair of shorts or pants does not have belt loops, the student must still tuck in their shirt.*

Dresses, Skirts, Shorts, and Pants

- All shorts, skirts, or dresses shorter than fingertip length when arms are held at one's side are prohibited. Low-cut necklines are prohibited. Dresses must have sleeves that are hemmed or cap sleeves.
- No sagging pants or shorts will be allowed. A belt must be worn inside the belt loops at all times. All pants and shorts are to be worn around the normal waist area.

Apparel and Outerwear

- Warm-up suits, sweat suits, sweat pants, biker shorts, spandex, overalls, soccer or boxer style shorts, and cotton pants with drawstrings or elastic waistbands are prohibited in the academic classroom. *As found in previous Dress Codes, athletic mesh shorts are prohibited. Examples: Nike and Addidas*

- Trench coats, dusters, and one-piece jump suits are prohibited. Professional/Collegiate athletic team coats or jackets are prohibited. *Example: Starter jackets*

- Professional/Collegiate athletic team jerseys are prohibited. WISD athletic teams or extra-curricular clubs/organizations may wear "game day" attire with the approval of the campus principal in connection with the sponsor, coach or other person in charge of the extracurricular activity.

- All hooded sweatshirts and sweatshirts with rounded necklines MUST follow the new t-shirt guidelines (example: solid, WISD, or collegiate). Of course, hoods shall not be worn indoors. All hooded sweatshirts and sweatshirts with rounded necklines do not have to be tucked in.

Accessories

- Visible pierced jewelry other than earrings on females is prohibited. Band-aides, plastic spacers, sticks, etc. to conceal body piercings are prohibited.

- Hats, caps, hoods, sweat bands, or bandanas, shall not be worn or carried indoors, except in the interest of religious practices, safety, cleanliness, or with the permission of the campus principal.
- Chains, including those attached to pants or wallets, and spiked jewelry are prohibited.
- An item of apparel or make-up that is considered extreme in dress is prohibited.
- Sunglasses may not be worn indoors, except with a signed note from the school nurse.

Footwear

- Shoes or sandals must be worn at all times. *All shoe laces must be tied at all times.*
- Shoes with metal cleats, taps, or wheels on the heels or soles, or shoes that can damage or mark floors are prohibited.
- House shoes, shower shoes, or slippers are prohibited.

Grooming

- Facial hair, mustaches, sideburns, goatees, and beards must be neatly groomed.
- Visible tattoos that are distractive or inappropriate are prohibited.
- The use of natural colored hair dye is permitted. Any colors that are not deemed natural color are

prohibited. Tipping or highlighting hair will be permitted as long as it is a natural hair color.

- Unusual haircuts or styles such as Mohawks, spikes, or excessive patterns are prohibited.

General

- Clothing, shoes, shoestrings, jewelry, bandanas, or grooming styles exemplifying gang attire or other unauthorized groups are prohibited. All black, all red, all blue, etc. attire is prohibited. *All camouflage attire is also prohibited.*
- Torn clothing and clothing with holes are prohibited.

Words and/or sentences in italics = clarifications or updates

Last clarifications and updates added:
Monday, August 6, 2007

Approved by the WISD Board of Trustees
on May 21, 2007

[LOGO] **Waxahachie**
Independent School District
411 N. Gibson Street • Waxahachie, TX 75165 •
(972) 923-4631 Phone • (972) 923-4759 Fax • www.wisd.org

October 31, 2007

Mr. Paul D. Palmer and Dr. Susan Gonzalez Baker
704 West Marvin
Waxahachie, Texas 75165

Re: Paul T. "Pete" Palmer, 10th Grade Student at Waxahachie High School Level Two Grievance Hearing

Certified Mail 7003 1680 0006 4827 9311

Dear Mr. Palmer:

On October 3, 2007 Mr. David Nix, principal of Waxahachie High School, heard a Level One complaint you filed on behalf of your son, sophomore Paul T. "Pete" Palmer. Pete was disciplined for wearing a t-shirt with the logo "John Edwards 08" emblazoned on the front. The school's dress code prohibits t-shirts, except for WISD clubs, organizations, sports, or spirit t-shirts, college or university t-shirts, or solid-colored t-shirts. The gist of your complaint is that this provision of the dress code infringes Pete's right to freedom of expression under the First Amendment of the U. S. Constitution. On October 8, 2007, Mr. Nix issued a Level One decision denying your complaint, and you have appealed to me at Level Two. We conducted a Level Two conference on October 19, 2007.

I have decided to affirm the decision made by Mr. Nix. Accordingly, your Level Two Grievance is denied. If you are not satisfied with this response to your Level Two meeting, you may request a conference with the WISD Board of Trustees, in order to appeal this Level Two decision. The appeal notice must be filed in writing, on a form provided by the District, within ten days after your receipt of this response.

I have appreciated your courteous advocacy throughout, and I wish Pete all the best as he continues his education at Waxahachie High School.

Sincerely yours,

/s/ Thomas J. Collins
Thomas J. Collins
Superintendent

From: David Nix [dnix@wisd.org]

Sent: Monday, October 08, 2007 4:45 PM

To: jandopete@sbcglobal.net

Cc: David Nix

Subject: Letter

October 8, 2007

Via Hand Delivered
Mr. Paul D. Palmer and Dr. Susan Gonzalez Baker
704 West Marvin
Waxahachie, Texas 75165

Re: Paul T. "Pete" Palmer, 10th Grade Student at Waxahachie High School Level One Grievance Hearing

Dear Mr. Palmer and Dr. Gonzalez Baker:

This letter is in response to the Level One Grievance conducted on Wednesday, October 3, 2007, at 10:00 a.m. regarding Paul T. "Pete" Palmer, a sophomore at Waxahachie High School. The conference was recorded, and all applicable procedures were followed.

During the conference on October 3rd and in your letter to Ms. Johnson received by the high school on Monday, September 24th, the following contentions were discussed and/or presented:

- You assert that Pete's right to freedom of expression under the First Amendment is impacted by the school district's dress code which prohibits all writing on student t-shirts, with the exception of WISD and university sponsored writing.

After considering the evidence presented and reviewing the WISD Secondary Dress Code and WISD Board Policy, I have made the following determinations:

- Changes to the Waxahachie ISD's Secondary Dress Code were implemented for many reasons. Included in these reasons were the importance of providing a safe and orderly learning environment for all students, to decrease the number of student dress code infractions from the 2006-07 to the 2007-2008 school year, to increase the focus on life-long learning after high school, and to encourage professional and responsible dress for all students. We believe by allowing collegiate and school-sponsored spirit t-shirts we are promoting post-secondary education and WISD school spirit.

- These changes have led to decreases in dress code referrals to the main office and a noticeable improvement in hallway and classroom behavior. These changes are providing an avenue for our students to participate in an environment conducive to learning. Our assistant principals are spending less time with office referrals for dress code allowing for more time for curriculum and instruction related classroom support. At this point in time, feedback from faculty and staff members, community members, and students has been positive in nature.

- Although non-school or post-secondary messages on student t-shirts are not permitted

during the school day, our students have a number of opportunities to express themselves through the wearing of buttons, jewelry or other symbols, forming a school sponsored club, and speaking at limited public forum opportunities available during the day. Additionally, the district allows for special, spirit t-shirt dress days throughout the school year. T-shirts such as your son's political t-shirt would be permitted on those occasions. Students are encouraged to discuss ideas and possible dates for these dress days with me, their campus principal. Pete may also wear his t-shirt after school hours and in extracurricular activities in which compliance with the Secondary Student Dress Code is not required.

- I am available to assist your son with the formation of an approved Waxahachie High School club or organization, such as a "Waxahachie High School Students for Edwards" club. This would allow Pete the opportunity to express support for the political candidate of his choice through a school-sponsored organization. I am happy to assist Pete in finding a campus sponsor, arranging for announcements to be made regarding membership opportunities, and facilitating the approval and creation of a school-sponsored club or organization t-shirt.

While I respect your view that Pete has the right to express himself, the Board of Trustees of this District has placed time, place and manner restrictions on such expression. The purpose of these restrictions is

to enhance the learning environment in our schools. Pete has a number of alternative methods for engaging in political expression, and I am available to assist him in finding opportunities for him to express himself within our school rules. Based on these determinations, I hereby deny the relief requested in connection with this Level One Grievance.

If you are not satisfied with this response to your Level One meeting, you may request a conference with the Superintendent, Mr. Thomas J. Collins, or designee, to appeal my Level One decision. The appeal notice must be filed in writing, on a form provided by the District, within ten days after receipt of this response.

Sincerely,

David Nix
Level One Hearing Officer
Principal, Waxahachie High School

Every Student. Every Chance. Every Day.